IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 23RD FEBRUARY 2007 / 4TH PHALGUNA 1928

MFA.No. 76 of 2005()

OP.(GUARDIAN) 203/2002 of I ADDL. DISTRICT COURT, PALAKKAD

APPELLANT: PETITIONER

G.MOHANAN, S/O.GOPALAN,
THEKKUMPURAM HOUSE, MELARKODE POST, MELARKODE
VILLAGE, ALATHUR TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.N.SUKUMARAN
SRI.S.SHYAM
SRI.N.K.KARNIS
SRI.BOBBYMATHEW KOOTHATTUKULAM
SRI.LATHEESH SEBASTIAN

RESPONDENT: RESPONDENT.

LATHIKA, D/O.MUTHU, THELUNGU THERUVIL
HOUSE, CHITTOOR POST, CHITTUR VILLAGE,
PALAKKAD DISTRICT.

BY ADV. SRI.G.SHRIKUMAR

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 12/2/2007,
THE COURT, ON 23/02/2007, DELIVERED THE FOLLOWING:

P.R. Raman & S. Siri Jagan, JJ.

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M.F.A. No. 76 of 2005

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Dated this, the 23rd February, 2007.

J U D G M E N T

Siri Jagan, J.

This appeal arises from the order of the District Judge, Palakkad in O.P (Guardian) No. 203/2002, whereby the District Court rejected the application of the father of two minor children for custody of the children. The children are with the respondent-mother. At the time of filing of the O.P, the children were aged 4 ½ and 3 years. The father filed the petition stating that the relationship between the appellant -husband and the respondent-wife soured as a result of which the respondent left him taking the children with her without the knowledge and consent of the appellant in the year 1999. His demand for restitution of conjugal rights having been rejected by the respondent-wife, he filed H.M.O.P.No.37/2002 before the Sub Judge, Palakkad for restitution of conjugal rights. He alleged that the respondent is not a well educated lady and she is now residing with her parents and brothers depending on them for her livelihood. The contention of the appellant is that in such a situation, it would not be in the welfare of the children to be with the respondent as the children would be deprived of proper education, proper clothes, proper health care etc., since the respondent does not have any independent income to maintain the children.

2. The respondent-wife contested the application stating that there is lack of bona fides on the part of the appellant-husband in filing the petition and his only motive is to harass the respondent. She would submit that she filed an application before the Judicial First Class Magistrate, Chittoor for maintenance as also a criminal complaint, C.C. No. 274/2001 under Section 498(A) of the Indian Penal Code read with Section 34 thereof. The present petition for

custody of the children, after three years, that too, without paying the maintenance for the children in spite of the specific orders passed by the Judicial First Class Magistrate, Chittoor in the petition for maintenance, is totally devoid of any bona fides whatsoever, is the case of the respondent-wife. She would therefore support the order of the District Court and pray for dismissal of the appeal.

3. We have considered the rival contentions of the parties in detail.

4. Admittedly, the respondent-mother and the children are residing separately from the appellant from July, 1999 onwards. For three long years, the appellant did not evince any interest even to see the children, let alone seek custody of them. Ext. A1 is the certified copy of the order in M.C.No. 54/2001 before the Judicial First Class Magistrate's Court, Chittoor whereby the appellant-father was directed to pay maintenance to the children and the mother. The appellant while giving evidence, admitted that the payment of maintenance as directed by Ext. A1 is in arrears. Of course, he would say that it is only up to Rs. 3,000/- but the respondent-wife would say that it would come to Rs.7,000/-. But the fact remains that the District Court has found that the appellant has no case that he has remitted or paid any amount towards maintenance to the wife and children as per Ext. A1 order. This shows that the appellant is not maintaining the minor children and not giving any amounts to the respondent towards maintenance of the children. Coming from such a father, that too, after three long years of separation from the children, an application for custody of the children allegedly for the welfare of the children cannot be believed to be with bona fides.

5. It is a fact that after July, 1999 till the respondent-mother filed the application for maintenance in 2001, the appellant-father did

not find it necessary to seek custody of the children. In fact, he filed the O.P only in 2002, three years after the separation. Since the Judicial First Class Magistrate's Court has ordered payment of maintenance, it is clear that the Court has accepted that the wife and children have sufficient reason to reside away from the appellant-father. In fact, the case of the respondent is that she was subjected to physical and mental torture by the appellant and his parents and she was forced to quit the appellant's residence in such circumstances. It is also to be noted in this connection that the wife had even chosen to file a criminal complaint under Section 498(A) of the Indian Penal Code read with Section 34 against the appellant and his parents.

6. Admittedly, the mother had studied up to +2 and the children have only just begun their schooling. That being so, the contention of the appellant that the wife is not in a position to give good education to the children cannot, at least for the present, be a ground for removing the children from the custody of the mother. Further, it is recorded by the District Judge that the appellant himself has admitted that both the children are now studying well and attending school. The appellant has also no case that the respondent-mother is unfit for having custody of the children for any plausible reasons. Further, we also note that the respondent has a complaint against the appellant to the effect that he is living in adultery with another lady by name Devi in his residence. In view of the demeanour in the box while giving evidence, in first totally denying the allegation and then claiming that the said Devi is an agricultural worker working in his house, the District Court found some substance in the allegation of the respondent-wife, which cannot also be lost sight of while deciding this case.

The cumulative effect of the above findings is that the order of

the District Court refusing custody of the children to the appellant does not suffer from any infirmity whatsoever and the same is only to be confirmed. We do so. However, we make it clear that it would be open to the appellant to visit the children at the residence of the respondent on any Saturday or Sunday between 2 o' clock and 4 o' clock in the after noon with prior intimation to the respondent for which the respondent shall make it convenient. With the above observation, the appeal is dismissed.

Sd/- P.R. Raman, Judge.

Sd/- S. Siri Jagan, Judge.

Tds/

[True copy]

P.S to Judge.